No. 14767

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

HAROLD KENNEDY, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

By judgment entered December 30, 1954, the District Court in this case held the United States liable under the Federal Tort Claims Act, 28 U. S. C. 1346 (b), 2671 *et seq.,* for damages suffered by appellee in an automobile collision caused by the negligence of a soldier who was on leave and was driving his own car (R. 3–6, 8–13). The District Court rejected the Government's defense that at the time of the accident the soldier was not acting within the scope of his employment (R. 7, 13–20) and entered judgment for plaintiff-appellee for $4,568.81 plus interest and costs (R. 54). The United States filed

notice of appeal on February 24, 1955 (R. 56). This Court's jurisdiction rests on 28 U. S. C. 1291.

STATEMENT OF THE CASE

On January 5, 1954 Post Headquarters at Fort Lewis, Washington, issued special orders relieving Sergeant First Class Richard E. Mayer of his assignment at that post effective January 14, 1954, and assigning him to duty at the Army Language School in the Presidio of Monterey, California, about one thousand miles south of Fort Lewis (R. 48–9). Sergeant Mayer was not required to report to the school until midnight January 28, 1954 and was authorized in the meantime to take ten days leave at his home point, Seattle, Washington, which is about 47 miles north of Fort Lewis, followed by four days time to travel the distance between Fort Lewis and the Presidio (R. 14–15, 63, 73).

The orders also offered Mayer the option of traveling to the Presidio by common carrier, to be selected by the Transportation Corps, or of securing his own means of transportation, including the use of a private vehicle if he so desired, in which case he was to be reimbursed according to the allowances authorized by the Joint Travel Regulations (Pars. 4150–1, 4151) for the cost of traveling between Fort Lewis and the Presidio, but not for travel between Fort Lewis and Seattle (R. 14, 72–3). For his personal convenience, Sergeant Mayer chose to use his own car, a four-year old Ford (R. 50).

On the morning of January 23, 1954, before the expiration of his ten days leave and five and a half

days before he was due to report to the Presidio of Monterey, Sergeant Mayer was driving his own car south on U. S. Highway 99, a four lane road, between Seattle and Tacoma, Washington (R. 51).[1] At a point about ten and one-half miles south of Seattle,[2] Mayer's car, traveling in the inside southbound lane after having just passed a truck, skidded on an icy patch in the road. The car slid across the center of the highway into the inside northbound lane where it was struck by a car driven by appellee. Both drivers were injured and hospitalized as a result of the accident.

Appellee brought suit against the United States on April 16, 1954, seeking damages for the loss of his car, personal injuries and other property damage (R. 3–6). The Government moved to dismiss the complaint upon the ground that Sergeant Mayer was not acting within the scope of his employment or in the line of duty at the time of the accident, but the court below took no action on that motion (R. 13). At the conclusion of the trial, held in December 1954, the trial judge rendered an oral opinion that "Sergeant Mayer at the time of the accident alleged in plaintiff's complaint was acting in the course of his employment as a person engaged in the military business of the Armed Forces of the United States, and the acts done by him in driving said car at said time were within

[1] Tacoma is about 30 miles south of Seattle and en route between Seattle and Fort Lewis.

[2] At this point Sergeant Mayer was about 36 miles north of Fort Lewis and therefore had not yet begun traveling on the Fort Lewis-Monterey trip for which he was to be reimbursed by the Army.

the scope of his authority" (R. 74). This ruling was based upon the finding that—

> * * * since with the permission of the Government Sergeant Mayer was here using his car to transport himself while on such Government business at the time and place of the accident, he necessarily must be regarded in law as being the operator of the transportation vehicle whether it was his own automobile or a Government automobile. Such automobile was just as much on Government business at the time and place of the accident as was the Government employee, Staff Sergeant Mayer (R. 75–6).

On December 20, 1954 the court entered judgment in favor of the plaintiff in the amount of $4,568.81 plus interest and costs (R. 54).

SPECIFICATIONS OF ERROR RELIED UPON

1. The District Court erred in holding that Sergeant First Class Richard E. Mayer was acting in the line of duty and within the scope of his employment at the time of the accident in question.

2. The District Court erred in ruling that the United States of America could at all times control Sergeant Mayer in his actions in the same manner that a private employer might have control over him had he been in the employ of such an employer.

3. The District Court erred in failing to hold that as a matter of law Sergeant Mayer was acting outside the scope of his employment inasmuch as he had not been directed by the United States to travel by his own automobile.

4. The District Court erred in failing to hold that as a matter of law Sergeant Mayer was acting outside the scope of his employment inasmuch as the use of his own automobile was for his personal convenience and not for that of the Government.

5. The District Court erred in concluding that the law of the State of Washington was relevant on the question of whether Sergeant Mayer was acting within the scope of his employment.

6. The District Court erred in concluding that plaintiff was entitled to judgment against the United States.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act and of the Joint Travel Regulations are set forth in the Appendix, *infra,* pp. 30–32.

INTRODUCTION AND SUMMARY OF ARGUMENT

I

In its oral decision, the court below ruled that the United States is liable for the negligent driving of Sergeant Mayer because "the acts done by him in driving [his] car at [the time of accident] were within the scope of his authority" (R. 74). Again, in Finding of Fact III the court found that Mayer "was making that trip within the scope of his authority" (R. 50). In our view, the court below misconceived the issue in this case. The issue, we submit, is whether Mayer was acting within the *scope of his employment* at the time and place of the accident, and, under the applicable federal court decisions, this would depend

upon whether the Government could control Mayer in the performance of the act he committed and whether he was then acting to further the Government's interests, not whether he was *authorized* to do what he was doing. Of course an employer can authorize the use of an automobile without assuming liability for its negligent operation.

In effect Mayer's orders stated that if he preferred, the Transportation Corps would arrange for his travel, would provide meal tickets, and would assume full responsibility for ensuring that he reached the Presidio on time; but if he so chose he would be permitted to arrange for his own transportation, without any supervision whatever, and would be reimbursed for the travel. By permitting Mayer to adopt the second alternative, the United States relinquished all control over the details of his transportation on this "change of station." It could neither control the safety of the vehicle used nor control or supervise Mayer's driving.

Furthermore, since Sergeant Mayer chose to drive his automobile for his personal convenience and not for the convenience of the Government, and because he was on leave at the time of the accident, he was not acting in furtherance of the Government's interests. His assigned duties did not encompass the driving of a car and he was not ordered to do so. It was of no concern to the Government what mode of transportation Mayer used to get to his new assignment, and it was certainly not in the interest of the Government for Sergeant Mayer to be driving his automobile at a point north of Fort Lewis when his new assignment was one thousand miles south of Fort Lewis.

II

Our contention is that it is well established that the Government's liability under the Federal Tort Claims Act is measured by the same standard whether the employee be a civilian or a serviceman and that this liability depends upon whether the tortfeasor-employee committed the tortious act within the scope of his employment. In our view this Court agreed with that position in *Williams* v. *United States,* 215 F. 2d 800 (1954).* For that reason, in the first part of our brief we analyze the facts of this case in terms of the traditional common law doctrine of *respondeat superior.* However there is language in the *Williams* opinion that could be interpreted as establishing a separate, more limited standard of liability for the torts of servicemen. But this language in the *Williams* opinion need not be amplified at this time because even under the broader *respondeat superior* standard of liability the United States would not be liable, and we are content to rest on that standard.

ARGUMENT

I. The United States is not liable under the respondeat superior doctrine for Sergeant Mayer's negligence.

Whether or not particular conduct of an employee is within the scope of his employment so as to impose vicarious liability upon his employer may depend upon numerous factors (see *Restatement, Agency* § 229 (1933); see also *Standard Oil Company* v.

*The Supreme Court granted certiorari in the *Williams* case on January 31, 1955.

Anderson, 212 U. S. 215 (1909)), but there are certain irreducible elements without which liability cannot attach under the doctrine of *respondeat superior,* and it is these elements which were not established in this case.

It is familiar law that the test for application of the *respondeat superior* doctrine is that the master-servant relationship must be shown to exist at the time of the injury and with respect to the very transaction out of which the injury arose. *Brailas* v. *Shepard S. S. Co.,* 152 F. 2d 849, 850 (C. A. 2, 1945), certiorari denied, 327 U. S. 807 (1946); *Lamb* v. *Interstate S. S. Co.,* 149 F. 2d 914, 917 (C. A. 6, 1945); *Mid-Continent Pipe Line Co.* v. *Whitely,* 116 F. 2d 871, 875 (C. A. 10, 1940). That relationship, in turn, can be shown to exist only where (1) the employer has the right and power to direct and control the employee in the performance of the negligent act or omission which caused the injury; and (2) where the employee was engaged on the employer's business when the tort occurred. *Standard Oil Co.* v. *Anderson,* 212 U. S. 215, 221 (1909); *Moye* v. *United States,* 218 F. 2d 81 (C. A. 5, 1955); *United States* v. *Sharpe,* 189 F. 2d 239 (C. A. 4, 1951); *United States* v. *Eleazer,* 177 F. 2d 914 (C. A. 4, 1949), certiorari denied, 339 U. S. 903 (1950); *Craige* v. *Austin Powder Co.,* 91 F. 2d 664 (C. A. 4, 1937); *P. F. Collier & Son Co.* v. *Hartfeil,* 72 F. 2d 625 (C. A. 8, 1934); *Phelps* v. *Boone,* 67 F. 2d 574 (C. A. D. C., 1933), certiorari denied, 291 U. S. 677 (1934); *Standard Oil Co.* v. *Parkinson,* 152 Fed. 681, 682

(C. A. 8, 1907); *Brady* v. *Chicago & G. W. Ry. Co.*, 114 Fed. 100 (C. A. 8, 1902).[3]

Although to avoid liability it may not be necessary for the United States to show that Sergeant Mayer was not acting within the "scope of his employment" when driving his car on the road to Tacoma, but only that he was not acting in "line of military duty," nevertheless we believe that even under the broad principles making employers liable for torts of civilian employees the United States cannot be held responsible for Sergeant Mayer's negligence because neither of the two elements necessary to establish the *respondeat superior* relationship are present here.

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[3] Federal law is the applicable law for determining whether Sergeant Mayer was acting within the scope of his employment or in the line of duty, *Williams* v. *United States*, 215 F. 2d 800 (C. A. 9, 1954); but even if Washington law were applicable, the same general principles of *respondeat superior* would apply. *Roletto* v. *Department Stores Garage Co.*, 30 Wash. 2d 439, 442, 191 P. 2d 875, 877 (1948); *Miles* v. *Pound Motor Co.*, 10 Wash. 2d 492, 117 P. 2d 179 (1941); *MacGrail* v. *Department of Labor and Industries*, 190 Wash. 272, 277, 67 P. 2d 851, 853 (1937); *Leech* v. *Sultan R. & Timber Co.*, 161 Wash. 426, 427, 297 Pac. 203, 204 (1931). The result would therefore not be different.

In a case somewhat similar to this one, *Gray* v. *Department of Labor & Industries*, 43 Wash. 2d 578, 262 P. 2d 533 (1953), the Supreme Court of Washington held, for purposes of workmen's compensation (where scope of employment is liberally construed because of the usual presumption in favor of workmen), that an employee was not on her employer's business, and therefore not operating within the scope of her employment when she, while using her employer's vehicle with his permission, was returning to work from a personal excursion. In that case, as here, the claimant was returning to work from her personal mission.

A. The Government neither exercised nor did it have the right to exercise the type of supervision and control which would give rise to respondeat superior liability for Sergeant Mayer's negligent act.

In the absence of the right or power in the employer to command or direct the employee in the performance of the act or omission charged, there can be no recovery under *respondeat superior* "because in such a case there is no superior to respond." *United States* v. *Eleazer,* 177 F. 2d 914, 917 (C. A. 4, 1949). This lack of control has, with respect to the very type of situation here presented, been consistently viewed as requiring a holding of non-liability on the part of the employer.

In the *Eleazer* case, *supra,* the Fourth Circuit held the United States not liable for the tort of a serviceman in circumstances very similar to those of this case. There, as here, the serviceman at the time of the accident was driving his own automobile pursuant to orders permanently changing his station but allowing him to take leave en route to the new station. In holding that the Government did not have sufficient control of the operations of the automobile to warrant its being held liable under the doctrine of *respondeat superior* the court quoted from § 239 of the *Restatement of Agency* (comment b) as follows:

> The fact that the instrumentality used by the servant is not owned by the master is a fact which may indicate that the use of the instrumentality is not authorized, or if authorized, that its use is not within the scope of employment. *The master may authorize the use of a particular instrumentality without assuming control over its use as a master.* The fact that

> he does not own it or has not rented it upon such terms that he can direct the manner in which it may be used indicates that the servant is to have a free hand in its use. If so, its control by the servant, *although upon his master's business,* is not within the scope of the employment. [177 F. 2d at 917. Emphasis supplied.]

The court also quoted from Illustration No. 4 under that section:

> * * * In going to a place at which he is to perform work for the master A drives his own car, carrying thereon necessary tools and materials belonging to the master. *In the absence of evidence that A owes P* (the employer) *any duty of obedience in the details of operating the automobile, such driving is not within the scope of employment."* [*Ibid.*]

This *Restatement* rule has also been applied in *Reiling* v. *Missouri Ins. Co.,* 236 Mo. App. 164, 178, 153 S. W. 2d 79, 86 (1941); *Blackman* v. *Atlantic City, &c. R. R.,* 126 N. J. L. 458, 462, 19 A. 2d 807, 808 (1941); *Holdsworth* v. *Penna. P. and L. Co.,* 337 Pa. 235, 241, 10 A. 2d 412 (1940); and *Khoury* v. *Edison Electric Illum'g Co.,* 265 Mass. 236, 164 N. E. 77 (1928). See also *Jozwiak* v. *United States,* 123 F. Supp. 65 (S. D. Ohio, 1954); *Ellis* v. *Service Co., Inc.,* 240 N. C. 453, 82 S. E. 2d 419 (1954); *Reardon* v. *Coleman Bros., Inc.,* 277 Mass. 319, 178 N. E. 638 (1931). In the *Khoury* case, cited in the *Eleazer* opinion, an electric company's regular employee negligently operated his own car while en route to install a flood light for the electric company in another city.

The company had not required nor requested the employee to use his car on its business but had merely agreed that if he used it he would be paid the equivalent of what he would otherwise be required to pay for railroad fares. The Massachusetts Judicial Court, noting that the company had no right to control the means and details of the transportation, which had been left entirely to the employee, decided that the company could not be held liable for his negligent operation of his automobile.

A recent opinion by Chief Judge Magruder in *Conversion & Surveys* v. *Roach,* 204 F. 2d 499 (C. A. 1, 1953), reiterates this rule. The basic question in that case, as here, was whether the employer could be held liable under *respondeat superior* for the employee's negligent operation of his privately owned car. In holding that there was no liability, Judge Magruder noted that there was no "evidence warranting the inference that the owner, while permissively using his car on company business, has yielded up to his employer this right to control speed, route and other details of operation." 204 F. 2d 499, 501. See also the Fifth Circuit's recent holding, per Chief Judge Hutcheson, that the United States, in a Federal Tort Claims Act suit, cannot be held liable under *respondeat superior,* "Where, as here, the car is the private car of the employee" and "no control whatever" is assumed by the United States. *Moye* v. *United States,* 218 F. 2d 81, 83 (C. A. 5, 1955).

Applying this settled rule to the facts in the instant case there can be no question that the United States at no time assumed or retained any right to control

any of the details of Sergeant Mayer's trip. Indeed, since Mayer was on leave at the time of the accident [4] and was therefore "at liberty to go where he will," [5] the United States could not have controlled the details of his trip. The Government, having ordered Sergeant Mayer to report to the Presidio, could have provided for his transfer thereto (1) by arranging directly with a common carrier to transport Sergeant Mayer to his new post; or (2) by permitting Sergeant Mayer to take care of the transportation problem himself in consideration of his being paid a certain mileage allowance computed over the shortest usually travelled route between his old and new station. § 303, Act of October 12, 1949, 63 Stat. 813, 37 U. S. C. 253; *Joint Travel Regulations,* Pars. 4150–4157 (1947).

In this case, Sergeant Mayer's orders gave him the option of choosing either alternative. He chose the second, and further decided to use his own car rather than to go by plane, train or bus. The United States thus was not called upon to provide or arrange for his transportation. Neither did the United States even purport to exercise any supervision or control over the trip or over his driving. Since Mayer elected to use his private car, he alone determined the route of the trip; he alone, in his private capacity, con-

[4] By terms of the order, Sergeant Mayer was relieved of his assignment at Fort Lewis effective January 14, 1954. He was given ten days leave beginning on that date (R. 14). His orders therefore did not become effective until January 24, 1955, the day following the accident. *Joint Travel Regulations*, Par. 3003–1b (1947).

[5] *United States* v. *Williamson*, 90 U. S. (23 Wall.) 411, 415 (1874).

trolled the type of car he drove, the condition of its repair, the effectiveness of its horn and brakes, the safety of its tires, and the condition of its lights, steering gear and other vital equipment.[6] It was Mayer who planned the entire performance of this transportation job, who made all the necessary inspections as to the safety of his privately owned car and who had the final say and full control over its mechanical fitness.

Further, it was for Mayer alone to decide how fast to drive his own car upon the icy road, when it was safe to pass the truck in front of him, when the brakes should be applied and how to prevent or ameliorate skidding. He was subject to no military instructions or directions in that respect. Indeed, the record does not even show whether Mayer held a Government driver's license.[7] Certainly he was not asked to show a license before leaving Fort Lewis in his own car.

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[6] By contrast compare the control which the United States exercises over maintenance and operation of its own motor vehicles. Army Regulation 700–105, Sections III and IV. Paragraph 19 of that Regulation makes commanding officers responsible for the proper operation of all Army vehicles under their supervision and for the performance of appropriate maintenance procedures according to the applicable Technical Manual. A separate provision prohibits the use of vehicles not in safe operating condition. Paragraph 26. Moreover, Paragraph 30 of AR 700–105 prohibits the hiring of any non-Army vehicle for more than 48 hours without prior approval of the Department of the Army. Paragraphs 33 and 34 of the Regulation deal with required inspections to be supervised by commanding officers to insure proper maintenance and compliance with regulatory standards.

[7] Paragraph 22 of AR 700–105 sets forth elaborate standards for testing of, and granting permits to, drivers of Army vehicles.

In short, the *only* duty the United States had in connection with Mayer's trip was that it was to pay him a travel allowance for the trip between Fort Lewis and the Presidio of Monterey, but as the Fourth Circuit said in *United States* v. *Eleazer,* 177 F. 2d 914, 917 (1949), certiorari denied, 339 U. S. 903 (1950):

> * * * the fact that the government was to pay him mileage to Corpus Christi is no more reason for imposing liability on it for his negligent driving than for imposing liability for the negligence of a railroad company or the pilot of an airplane, if he had chosen to make the trip by rail or by air.

Accordingly there is no justification for concluding that Sergeant Mayer, when driving the car involved in the accident, was then subject to the control or the right of control of the United States with respect to his conduct in the performance of his transportation duties. To the contrary, the facts demonstrate that at the time of the accident he was about as free from Army control as any man could be who was still a member of the armed forces.[8]

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[8] Technically, Mayer's true position with respect to the United States was much like that of an "independent contractor." See *Craige* v. *Austin Powder Co.*, 91 F. 2d 664 (C. A. 4, 1937); *Khoury* v. *Edison Elec. Illum'g Co.*, 265 Mass. 236, 164 N. E. 77 (1928); *Holdsworth* v. *Penna P. & L. Co.*, 337 Pa. 235, 10 Atl. (2d) 412 (1940); *Leech* v. *Sultan R. & Timber Co.*, 161 Wash. 426, 297 Pac. 203 (1931); *Larson* v. *American Bridge Co.*, 40 Wash. 224, 82 Pac. 294 (1905).

B. Sergeant Mayer was not on Government business at the time of the accident.

Despite the District Court's conclusion to the contrary, that court's findings of fact plainly establish that Sergeant Mayer was not acting in furtherance of the Government's business at the time of the accident. Those findings show that before the accident Sergeant Mayer had received orders detaching him from his assignment at Fort Lewis, Washington, and directing him to report at a later date for duty at the Presidio of Monterey, California; that the orders also permitted him, before reporting to his new post, to take leave at Seattle, Washington, in the opposite direction from Monterey; that Mayer, driving his own car, collided with appellee at a point between Seattle and Fort Lewis before Mayer had reached the starting point for that part of the trip for which he was to be reimbursed; and that the accident occurred before the expiration of Mayer's ten days' leave. These facts, we submit, permit no conclusion other than that Sergeant Mayer was not engaged in Government business at the time of the accident.

1. *The mode of transportation used by Mayer was a matter of indifference to the United States.* Although the United States directed Mayer to report to his new station in Monterey and authorized transportation to that new station, once Mayer had chosen to provide his own means of transportation the United States was relieved of any concern with the mode of travel used. It was a matter of complete indifference to the United States whether Mayer traveled by air, rail or road. Its only concern was that he report to

the Army Language School by midnight of January 28, 1954. Otherwise he was completely free to do what he pleased. Mayer was not directed to use his own car, nor was it essential to the discharge of his duties under travel orders for him to travel in his own car. "When he chose to drive his own car, instead of availing himself of commercial transportation, he was acting in furtherance of his own purposes, not those of the Government; and his action in driving the car cannot reasonably be said to have been action taken within the scope of his employment or office." *United States* v. *Eleazer,* 177 F. 2d 914, 916 (C. A. 4, 1949), certiorari denied 339 U. S. 903 (1950). Also, see *Murphy* v. *United States,* 113 F. Supp. 345 (W. D. N. Y., 1953), where the court held a soldier not to be acting on Government business when driving his own car to his duty assignment from his quarters off post.

In a case much like this one the Fourth Circuit was faced with the question of whether a serviceman using his own automobile for travel to an assigned duty station was acting within the scope of his employment for purposes of the Federal Tort Claims Act. *Paly* v. *United States,* — F. 2d — (C. A. 4, 1955), affirming 125 F. Supp. 798 (D. Md., 1954); see R. 21–45. In the *Paly* case a sailor was ordered to accompany the remains of a fellow sailor, who had died in service, from the Patuxent River Base in Maryland to Baltimore and to attend the funeral there as a courtesy of the United States. The sailor chose to use his own car for the trip (the remains of

the deceased sailor having been sent to Baltimore previously) for which he would be reimbursed in accordance with general authorized practice in such matters (R. 26). Although the serviceman was not on leave, as Mayer was here, but was traveling to Baltimore to perform an official function, the District Court held that the United States was not liable for the sailor's negligent driving because he took his own car for his own convenience when he could have traveled by common carrier or could have requested official transportation (R. 42). The Fourth Circuit affirmed in a brief *per curiam* opinion.

2. *A soldier on leave is not engaged in the business of the United States.* The Supreme Court has stated that while on leave a soldier is "at liberty to go where he will during the permitted absence, to employ his time as he pleases and to surrender his leave as he chooses." *United States* v. *Williamson,* 90 U. S. (23 Wall.) 411, 415 (1874). The leave is a favor "granted for his sole accommodation" to permit him to "enjoy a respite from military duty." *Foster* v. *United States,* 43 C. Cls. 170, 175 (1908). "A leave of absence or a furlough is a favor extended. A soldier can not have a furlough forced upon him." *Hunt* v. *United States,* 38 C. Cls. 704, 710 (1903).

The mere fact that a serviceman is on leave with his commander's approval plainly cannot be deemed to convert a purely voluntary undertaking for the serviceman's personal accommodation into the performance of business for the United States. If this accident had occurred when Mayer was traveling under orders granting him permission to take ordinary leave

and was returning to his duty station at Fort Lewis when the accident occurred, it is clear that the United States would not have been liable. See, *e. g., Bach* v. *United States,* 92 F. Supp. 715 (S. D. N. Y., 1950) (Ensign returning to duty from weekend leave and driving own car held not on Government business). Here, the only difference is that Mayer was under orders to return to duty at the Presidio of Monterey, rather than at Fort Lewis.

Nor does the fact that Sergeant Mayer had been directed to report to Monterey by a certain date make a trip to his home official business of the United States. Regardless of what his relationship to the United States might have been had he been proceeding directly from Fort Lewis to Monterey in compliance with his travel orders,[9] it is clear that he was not, at the time of the accident, so proceeding. At that time he was, for his personal convenience, voluntarily taking advantage of permission to take leave in Seattle. The leave of absence suspended the effective date of his detachment from Fort Lewis, and it was only at the expiration of the leave that Sergeant Mayer came under operation of the order. *Joint Travel Regulations,* Par. 3003–1b (1947).

Thus, contrary to the conclusion of the court below, Mayer was not traveling "pursuant to" the order but was simply taking advantage of the leave privilege

[9] As we have shown above, pp. 12–15, even if Mayer had been on Government business, for the purpose of otherwise imposing liability under *respondeat superior*, the United States would not have been liable because it had no control over his driving or other details of the transportation.

extended by the order for his personal benefit and accommodation. The Government is not interested in how a serviceman employs his time during his leave. See 16 Comp. Dec. 611, 616. The Government can no more be held liable for Mayer's negligence in the operation of his own car than it could be for his negligence in any other activity in which he engaged during his leave.

Finally, the fact that the order stated that this travel is deemed necessary (TDN), as emphasized in the direct examination of Warrant Officer Cichy (R. 60–62), does not justify categorizing the act of driving Mayer's personally owned automobile from Fort Lewis to the Presidio as the furtherance of his employer's official business; even less does it justify the bringing of Mayer's purely personal trip from Fort Lewis to Seattle and back to Fort Lewis within the same category. The travel required by the order was between Fort Lewis and the Presidio of Monterey and, with respect to such official travel *between the two posts,* the language used by the order merely reflects the statutory conditions that mileage allowances for military men is payable only for travel on "public business." Act of June 30, 1876, 19 Stat. 65; Act of March 8, 1883, 22 Stat. 406, 10 U. S. C. 747; Act of March 6, 1894, 28 Stat. 237, 10 U. S. C. 759; Rev. Stat. 1612, 34 U. S. C. 971; *Perrimond* v. *United States,* 19 C. Cls. 509 (1884). But persons traveling on "public business" for purposes of reimbursement of travel expenses are not necessarily acting within the scope of their employment, nor, in fact, are they necessarily even employees of the United States. The Govern-

ment is authorized in many instances to pay mileage allowances to individuals never in its employ or to those whose employment with it has been finally terminated.[10]

Moreover the other facts emphasized above—that the Government had no interest in the means Mayer used to reach the Presidio, that driving his own automobile was not within the general scope of the duties to which Mayer had been assigned, that at the time of the accident he was on leave, and that the accident occurred between Seattle and Fort Lewis, at a point in the opposite direction from that in which Mayer would have been heading had he been going to his next station—conclusively show that at the time of the accident here involved Mayer was not engaged in Government business and was not furthering the Government's interests.

II. The respondeat superior standard of liability is the only standard applicable under the Federal Tort Claims Act whether the tortfeasor-employee be civilian or serviceman.

The Federal Tort Claims Act permits suit against the United States only within the limits of the doctrine of *respondeat superior; i. e.,* only where the tortious act of an employee was committed within the

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[10] Act of August 2, 1946, 60 Stat. 855, 37 U. S. C. 117a–1 (mileage allowance for cadet candidates traveling to the Academy to take examinations); 28 U. S. C. 1821 (mileage allowance for witness' travel to and from court); Act of March 14, 1940, 54 Stat. 49, 38 U. S. C. 76 (mileage allowance for veterans traveling to and from Veterans Administration hospitals for examinations or treatment); *Baylis* v. *United States*, 79 C. Cls. 486 (1934) (even though travel performed after effective date of retirement, officer entitled to mileage allowance).

scope of his employment. As explained by the Court of Appeals for the Fifth Circuit, "The whole structure and content of the Federal Tort Claims Act makes it crystal clear that in enacting it and thus subjecting the Government to suit in tort, the Congress was undertaking with the greatest precision to measure and limit the liability of the Government under the doctrine of respondeat superior." *United States* v. *Campbell,* 172 F. 2d 500, 503 (C. A. 5, 1949), certiorari denied, 337 U. S. 957 (1949); also quoted in *Williams* v. *United States,* 215 F. 2d 800, 809 (C. A. 9, 1954); *United States* v. *Eleazer,* 177 F. 2d 914, 918 (C. A. 4, 1949), certiorari denied, 339 U. S. 903 (1950); cf. *Christian* v. *United States,* 184 F. 2d 523 (C. A. 6, 1950).

Under the Act, the liability of the United States is expressly limited to the negligence of any employee occurring while the employee was acting "within the scope of his office or employment" (28 U. S. C. 1346 (b)). Further, the Act limits the Government's liability to that which "a private individual" would have "in like circumstances" (28 U. S. C. 1346 (b), 2674). Generally, there is, of course, no vicarious liability of a private person for the tort of an employee except when the employee acted within the scope of his employment.

Although we believe this principle to be well-settled and have assumed its truth in analyzing the facts in this case, the contention has been made that a different standard of liability must be applied when a member of the armed forces is involved. In the court below, appellee argued that even if Mayer did not

act within the scope of his employment, the United States would nevertheless be liable if he acted "in the line of duty" as that term is used in legislation granting benefits to servicemen or their dependents for injury or death incurred during the serviceman's period of military service. This contention is based upon the language of 28 U. S. C. 2671 (c) which provides, " 'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty."

Appellee seems to read that definition as evidencing Congressional intent to put military personnel into a separate category as to which there would be a different standard of liability. But the purpose of this provision was just the opposite—it was designed to place military men in the same category as civilian personnel so that the Government's liability would be the same whether the employee be civilian or military. The "line of duty" language was used to describe "more correctly" the conduct of military personnel in acting for the Government (*United States* v. *Eleazer,* 177 F. 2d 914, 918 (C. A. 4, 1949), certiorari denied 339 U. S. 903 (1950)) because soldiers and sailors generally are not considered to be under "employment" with the United States; hence the phrase "scope of employment" without the clarifying language might have had an uncertain or awkward meaning as applied to their conduct. This was also expressly recognized by Congress in specifically defining "employee of the Government" in the Federal

Tort Claims Act (28 U. S. C. 2671 (b)) to include "members of the military or naval forces of the United States." Further recognition was manifested in the committee reports accompanying several of the earlier tort claims bills which incorporated language similar to that appearing in Section 2671. See H. R. Rep. No. 667, 69th Cong., 1st Sess. 6 (1926); H. R. Rep. No. 286, 70th Cong., 1st Sess. 6–7 (1928); H. R. Rep. No. 2800, 71st Cong., 3d Sess. 12–13 (1931).

These definitions, it was pointed out at hearings on the predecessor bills, were inserted to "make it clear that the act covers all federal agencies, including corporate instrumentalities, and all federal officers and employees, *including members of the military and naval forces.*" (Emphasis supplied.) *Hearings Before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463,* 77th Cong., 2d Sess. 7 (1942). The deliberate language used by Congress to make certain that the Act would not be held inapplicable to torts of military personnel, should not, we submit, be wrenched out of context so as to leave a lacuna in the Act's pattern of emphasis upon the normal *respondeat superior* relationship as limiting liability of the United States.

Although the same term—"scope of employment"—may not be entirely appropriate to describe the relationship of serviceman to Government, the same principles that guide courts in determining whether a civilian acts within the "scope of his employment" can be, and have been, applied to military personnel. In virtually every case that has come before the

federal courts involving the question of liability of the United States for tortious acts of a member of the armed forces the courts have followed the normal principles underlying the doctrines of *respondeat superior* and scope of employment, and most have done so without even referring to a "line of duty" test.[11] In some cases, the courts have mentioned that for military men the test is whether the serviceman was acting "in the line of duty" but, recognizing that in this context that term is merely a more apt way of referring to the well-established common law doctrine of *respondeat superior,* have proceeded to apply the usual scope of employment principles.[12] The Supreme

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[11] *Moye* v. *United States*, 218 F. 2d 81 (C. A. 5, 1955); *United States* v. *Sharpe*, 189 F. 2d 239 (C. A. 4, 1951); *Christian* v. *United States*, 184 F. 2d 523 (C. A. 6, 1950); *United States* v. *Eleazer*, 177 F. 2d 914 (C. A. 4, 1949), certiorari denied, 339 U. S. 903 (1950); *Rutherford* v. *United States*, 168 F. 2d 70 (C. A. 6, 1948); *Rosa* v. *United States*, 119 F. Supp. 623 (D. Hawaii, 1954); *Spradley* v. *United States*, 119 F. Supp. 292 (D. N. Mex., 1954); *Murphy* v. *United States*, 113 F. Supp. 345 (W. D. N. Y., 1953); *Stekovich* v. *United States*, 102 F. Supp. 925 (M. D. Pa., 1952); *Poston* v. *United States*, 101 F. Supp. 904 (W. D. Ky., 1952); *Brown* v. *United States*, 99 F. Supp. 685 (S. D. W. Va., 1951); *Alexander* v. *United States*, 98 F. Supp. 453 (E. D. S. C., 1951); *Greenwood* v. *United States*, 97 F. Supp. 996 (W. D. Ky., 1951); *Parrish* v. *United States*, 95 F. Supp. 80 (M. D. Ga., 1950); *Bach* v. *United States*, 92 F. Supp. 715 (S. D. N. Y., 1950); *Creal* v. *United States*, 84 F. Supp. 249 (W. D. Ky., 1949); *Gibson* v. *United States*, 83 F. Supp. 990 (S. D. W. Va., 1949); *Cropper* v. *United States*, 81 F. Supp. 81 (N. D. Fla., 1948).

[12] *King* v. *United States*, 178 F. 2d 320 (C. A. 5, 1949), certiorari denied 339 U. S. 964 (1950); *Hubsch* v. *United States*, 174 F. 2d 7 (C. A. 5, 1949), certiorari dismissed, 340 U. S. 804 (1950); *United States* v. *Campbell*, 172 F. 2d 500 (C. A. 5, 1949), certiorari denied, 337 U. S. 957 (1949); *Baker* v. *United States*, 127 F. Supp. 644 (D. D. C., 1955); *Roger* v. *Elrod*, 125 F. Supp. 62 (D. Alaska,

Court of Canada, in interpreting a statute similar to the Federal Tort Claims Act,[13] has also followed the normal *respondeat superior* test in determining liability of the Crown to third persons for the torts of military personnel. *The King* v. *Anthony,* [1946] Can. Sup. Ct. 569.

In *Campbell* v. *United States,* 172 F. 2d 500 (C. A. 5, 1949), certiorari denied, 337 U. S. 957 (1949), the claimant also urged that the Court of Appeals adopt a separate, broader standard of liability for the torts of military personnel. In rejecting that suggested construction of the Act the Court of Appeals said (at 503):

> Such a construction would be to give to the phrase, "within the scope of his office or employment" not one consistent meaning throughout the act, but two inconsistent meanings, one of these applying to acts of all government employees except members of the armed forces,

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1954); *Paly* v. *United States*, 125 F. Supp. 798 (D. Md., 1954), affirmed, — F. 2d — (C. A. 4, 1955); *Seidon* v. *United States*, 123 F. Supp. 828 (E. D. N. Y., 1954); *Moye* v. *United States*, 117 F. Supp. 236 (S. D. Tex., 1954), affirmed, 218 F. 2d 81 (C. A. 5, 1955); *St. Paul Fire & Marine Ins. Co.* v. *United States*, 116 F. Supp. 51 (D. Mont., 1953); *O'Connell* v. *United States*, 110 F. Supp. 612 (E. D. Wash., 1953); *Clemens* v. *United States*, 88 F. Supp. 971 (D. Minn., 1950); *Cannon* v. *United States*, 84 F. Supp. 820 (N. D. Cal., 1949), reversed on other grounds, 188 F. 2d 444 (C. A. 9, 1951); *Rutherford* v. *United States,* 73 F. Supp. 867 (E. D. Tenn. 1947), affirmed 168 F. 2d 70 (C. A. 6, 1948).

[13] Section 19 (c) of the Exchequer Court Act, Can. Rev. Stat. 1927, c. 34, under which tort claims are brought against the Crown in Canada, grants jurisdiction to that court over "Every claim against the Crown arising out of any debt or injury to the person or property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment."

> would subject the United States to liability to third persons for acts of its employees only as and to the same extent that a person in private employment would be liable under the law of the state where the accident occurred. The other, applying to acts of military personnel would subject the Government to fantastic claims of liability having no relation to the doctrine of respondeat superior, as it is known and applied, in determining the liability of private persons. It would do this, too, in the face of the known purpose of the Tort Claims Act, as shown by its antecedent history, and the record made in its passage, to make the United States liable to third persons for the acts of its employees under the same circumstances, and no other, as those under which private persons would be liable for the acts of their employees according to the law of the place where the injury occurred.

We believe that this Court agrees with our contention that the Federal Tort Claims Act establishes a single standard of liability, for in *Williams* v. *United States,* 215 F. 2d 800 (1954), the claimant apparently urged that a separate, broader standard of liability based upon "line of duty" be followed for the torts of servicemen. But this Court rejected that position, holding that " 'acting in line of duty' means *acting in line of military duty.*" Moreover, the opinion cited with approval *United States* v. *Eleazer,* 177 F. 2d 914 (C. A. 4, 1949), certiorari denied 339 U. S. 903 (1950), and *United States* v. *Campbell,* 172 F. 2d 500 (C. A. 5, 1949), certiorari denied 337 U. S. 957 (1949), both of which state expressly that the

"line of duty" language in the Act does not change the applicability of the basic *respondeat superior* principles.[14]

There is language in this Court's opinion in the *Williams* case[15] which could be interpreted as ruling that a *more stringent* standard of liability applies with respect to the torts of servicemen. Whether the opinion intended to establish a separate standard need not be decided here, however, since, as we have shown above, even under the traditional *respondeat superior* standard of liability, the United States could not be held responsible for Mayer's *negligence.* For this reason, and because the United States has, in the past, consistently argued that a single standard of liability should be followed, our argument has been presented in terms of the traditional *respondeat superior* principles.

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[14] If any further evidence is needed, see the dissent of Circuit Judge Bone (who wrote this Court's opinion in the *Williams* case) in *Murphey* v. *United States*, 179 F. 2d 743 (C. A. 9, 1950) at 746–747, where Judge Bone states:

> The Fifth Circuit has held that, as used in the Act, "line of duty" is equivalent to "scope of employment" and is to be determined by the doctrine of respondeat superior in the same manner and to the same extent as the liability of private persons under that doctrine is measured in the various states. United States v. Campbell, 5 Cir., 172 F. 2d 500, certiorari denied 337 U. S. 957, 69 S. Ct. 1532. See also Hubsch v. United States, 5 Cir., 174 F. 2d 7. I think that these two cases correctly state the proper rule of law, are in point, and (under California law) should control our decision in this case.

[15] See 215 F. 2d 807–8.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX

A. Sections 1346 (b), 2674 and 2671 of Title 28 U. S. C. (the reenactment of the Federal Tort Claims Act, 62 Stat. 933, 982, 983) provide in pertinent part:

Section 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

Section 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

Section 2671. *Definitions.*

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

* * * * *

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

B. Paragraphs 3003–1b, 4150–1 and 4151 of the *Joint Travel Regulations* provide, in pertinent part:

Par. 3003. TYPES OF ORDERS

1. Permanent change of station

* * * * *

b. *Effective Date.* The effective date of orders issued to a member, when the orders do not involve leave or delay en route, is the date of the member's relief from the old station (detachment). When leave or delay prior to reporting to the new station is authorized in the basic order, the amount of such leave or delay will be added to the date of relief from the old station (detachment) to determine the effective date of orders.

* * * * *

Par. 4150. PERMANENT CHANGE OF STATION ALLOWANCES

1. *General.* Allowances for permanent change of station travel performed within the United States will be as follows, subject to the election of the traveler except for group travel and travel directed by a particular mode as provided in subpars. 2 and 3:

1. mileage at the rate of 6 cents per mile not to exceed the official distance and subject to the limitations contained in par. 4157 and Chapters 5 and 6; * * *

Par. 4151. ALLOWANCES ON A MILEAGE BASIS

Mileage is an allowance to cover the average cost of first class transportation including sleeping accommodations, cost of subsistence, lodging, and other incidental expenses directly related to the travel. Mileage is payable for the official distance between permanent duty stations, including travel directed via temporary duty points en route under the following circumstances:

1. when travel is performed by privately owned conveyance; * * *

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